**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 | ) | CC Docket No. 96-128 |
| | ) | |
| Petition of the Florida Public Telecommunications Association, Inc. for a Declaratory Ruling and for an Order of Preemption Concerning the Refund of Payphone Line Rate Charges | ) | |

# REPLY COMMENTS OF THE FLORIDA PUBLIC TELECOMMUNICATIONS ASSOCIATION, INC.


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The Florida Public Telecommunications Association, Inc. (FPTA) hereby submits the following Reply Comments to address the arguments raised by AT&T, Inc., BellSouth Telecommunications, Inc., and the Verizon Telephone Companies (hereinafter, the BOCs) in opposition to the FPTA Petition.[1]

## I. Introduction

In its Petition, FPTA seeks an Order from the Federal Communications Commission (FCC, or Commission) declaring that, prior to the issuance of a Final Order of the Florida Public Service Commission (FPSC) on October 7, 2004,[2] BellSouth Telecommunications, Inc.'s

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[1] *Implementation of the Pay Telephone and Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Comments of AT&T, Inc., BellSouth Telecommunications, Inc., and the Verizon Telephone Companies on Florida Public Telecommunication Association's Petition for a Declaratory Ruling (filed Feb. 28, 2006) (*BOC Comments*).

[2] *In re: Petition for expedited review of BellSouth Telecommunications, Inc.'s intrastate tariffs for pay telephone access services (PTAS) rate with respect to rates for payphone line access, usage, and features, by Florida Public Telecommunications Association*, Florida Public Service Comm'n., Docket No. 030300-TP, Oct. 7, 2004 (*FPSC Payphone Order*).

(BellSouth) payphone line rates did not comply with applicable statutory or FCC requirements, and that the BellSouth tariffs prior to that date were not established or approved in accordance with the designated procedures, methods, or rules established by the FCC, and, as such, contravened Section 276 of the Communications Act, 47 U.S.C. § 276, and thereby departed from the essential requirements of law. FPTA further seeks a declaration that pursuant to an express undertaking furnished by BellSouth and the BOC Coalition reflected in certain of the Commission's Orders,[3] PSPs in Florida are entitled to a refund of access line charges paid from April 15, 1997 to November 10, 2003 (the date on which BellSouth filed a modified tariff bringing its payphone line charges into substantial compliance with the Commission's rules) to the extent those charges exceeded rates that comply with section 276 of the Act, including the equivalent of any end user common line (EUCL) collected during that period of time. Finally, FPTA seeks an Order preempting any inconsistent or unlawful portions of the *FPSC Payphone Order* to the extent that the Commission deems such action necessary as a prerequisite to ordering the requested refunds in the current proceeding.

Throughout their Comments, the BOCs appear to ignore the consequences of what amounts to years of unsuccessful challenges to the Commission's legal authority to implement regulations governing intrastate payphone rates, litigation that the BOCs themselves instigated and perpetuated. For example, by characterizing the rates in effect between April 15, 1997 and November 10, 2003 as "properly approved by the Florida Public Service Commission under this

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[3]*See Implementation of the Pay Telephone and Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, DA 97-678, 12 FCC Rcd 20997 (Com. Car. Bur., rel. Apr. 4, 1997) (*Bureau Waiver Order*), and Order, 12 FCC Rcd 21370 (Com. Car. Bur., rel. Apr. 15, 1997) (*Bureau Refund Order*).

Commission's precedents" (*BOC Comments* at 1), the BOCs simply ignore the Commission's requirement that the states use a "particular rate-setting methodology" (a forward-looking cost-based method) that complies with the new services test (NST) and, in particular, avoids double recovery by excluding the federal EUCL charge. *New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69, 73 (D.C. Cir., 2003) *aff'g In the Matter of Wisconsin Public Service Commission*, Case No. Bureau/CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd.2051 (rel. Jan. 31, 2002) (*Commission Wisconsin Order*). Similarly, by urging that its rates were lawful on the grounds of a statement by the FPSC in an uncontested 1998 Notice that it "believed" that BellSouth's tariffs were "cost-based and thus meet the 'new services test," the BOCs ignore the plain fact that the FPSC's statement was clearly wrong, if for no other reason than because the rates in question continued to charge and collect the interstate EUCL on top of the fully loaded intrastate line charges.[4]

Moreover, by insisting that FPTA's petition is procedurally barred under the doctrine of res judicata (or similar doctrines of collateral estoppel or the filed rate doctrine), the BOCs deny the plain meaning and effect of Section 276(a) of the Communications Act, 47 U.S.C. § 276(c), that "[t]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State

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[4]*BOC Comments* at 3-4, *quoting In re: Establishment of intrastate implementation requirement governing federally mandated deregulation of local exchange company payphones*, Noice of Proposed Agency Action Order Approving Federally Mandated Intrastate Tariffs for Basic Payphone Services, Docket No. 970281-TL, Order No. PSC-98-1088-FOF-TL (Aug. 11, 1998). Of course, the FPSC's mere declaration that "current tariffed rates for intrastate payphone services are cost-based and thus meet the 'new services' test," *Id.* at 5, does not make it so, particularly since the FPSC's "belief"was expressed without the benefit of a hearing and prior to the clarification that emerged from the FCC in the form of the *Commission Wisconsin Order* and related Orders and judicial decisions with respect to the requirement that at a minimum NST-compliance necessitates backing out the EUCL, which BellSouth's tariffs between April 15, 1997 and November 10, 2003 failed to do.

requirements." The suggestion that res judicata or other procedural preclusion could bar the relief sought by FPTA under circumstances in which a state has clearly failed properly to discharge the Commission's regulations would render the Commission's statutory preemption authority a nullity and undermine its ability to discharge the Commission's clear regulatory mandate. In this light, the BOCs' claim that the FPTA is attempting to "relitigate" matters already properly decided by the FPSC is plainly without merit.

The BOCs also erroneously suggest that the legal basis of FPTA's Petition somehow requires BellSouth to have been under a duty to "'automatically change its payphone rates upon a change in costs.'" *BOC Comments* at 4 *quoting FPSC Payphone Order* at 4. In fact, FPTA makes no such argument and claims no such supposed duty. Nor does the relief requested by FPTA contemplate or require any such duty. What the circumstances behind this proceeding and the Commission's rules plainly *did* require, and what BellSouth plainly *failed to do*—(until October 27, 2003, a few weeks prior to having to file sworn written testimony with the FPSC for the first time on the issue of whether its payphone line charges subsequent to April 15, 1997 double-charged its costs by at least the amount of the EUCL charge)—was file in a timely manner with the FPSC a revised tariff that complied with the requirements of Section 276 of the Telecommunications Act of 1996,[5] 47 U.S.C. § 276, as implemented by the Commission in its *Payphone Orders*,[6] the *Bureau Waiver Order*, the *Bureau Refund Order,* the *Bureau Wisconsin*

[5]Pub. L. No. 104-104, 110 Stat. 56 (*1996 Act*).

[6]*Implementation of the Pay Telephone and Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20541 (Sept. 20, 1996) (*First Payphone Order*), Order on Reconsideration, 11 FCC Rcd 21233 (Nov. 8, 1996), *aff'd in part and remanded in part*, Illinois Pub. Telecomm's. Ass'n. v. FCC, 117 F.3d 555 (D.C.Cir. 1997)(collectively, the *Payphone Orders*).

*Order*[7] and the *Commission Wisconsin Order.*

Admittedly, not until the Deputy Chief of the Common Carrier Bureau on March 2, 2000 released an Order expressly saying so did it became crystal clear beyond any shadow of a doubt that rates which continued to charge EUCL amounts in addition to amounts that more than covered the full direct costs of providing payphone access lines would necessarily fail to satisfy the NST.[8] At that juncture any and all doubts over whether a tariff that recovered all direct costs plus a reasonable overhead allocation while also continuing to charge the interstate EUCL amount failed, as a matter of law, to comply with the NST had completely evaporated, particularly since the Deputy Chief expressly stated that in setting its rates BellSouth "must demonstrate" that it had taken the EUCL into account. *Id.*

Nonetheless, even after the issuance of *that* Order, BellSouth still took no steps to bring its line charges into compliance. Instead, while continuing to extract line charges that BellSouth knew (or, at the very least, should have known) resulted in double recovery of a significant element of its costs, BellSouth, along with the rest of the BOCs, appealed the *Bureau Wisconsin Order* to the full Commission, which in January 2002 rejected the BOCs appeal,[9] and then *appealed again* to the District of Columbia Circuit, which in July 2003 also rejected the appeal.[10] Nevertheless, even *after the exhaustion of all its appeals*, BellSouth still continued for several

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[7]*In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, DA No. 00-347, Order, 15 FCC Rcd 9978 (Mar. 2, 2000)(*Bureau Wisconsin Order*).

[8]*Bureau Wisconsin Order* at para. 12 ("In order to avoid double recovery of costs, therefore, the LEC must demonstrate that in setting its payphone line rates it has taken into account other sources of revenue (*e.g.*, SLC/EUCL, PICC, and CCL access charges) that are used to recover the costs of the facilities involved.").

[9]*See Commission Wisconsin Order.*

[10]*See New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir., 2003).

months to charge excessive access line charges, and indeed persisted in doing so until October 2003 when, on the eve of a hearing at which a BellSouth representative was scheduled to testify before the FPSC on the specific issues of whether BellSouth had reduced its payphone line access charges by the amount of the interstate EUCL and whether BellSouth had ceased charging the EUCL on payphone lines, BellSouth *finally* made an attempt to comply with the Commission's rules, filing with the FPSC a tariff that reduced its payphone access line charges by precisely the amount of the EUCL.

Against this backdrop of recalcitrance and intentional defiance of the regulatory obligations that had been repeatedly confirmed and clarified by the Commission and the federal judiciary, BellSouth now argues that its payphone line access charges were nonetheless "proper" and, even if they were not, that it was FPTA and not BellSouth that had the duty to do something about it. This argument strains credibility and brings regulatory chutzpah to a new and unprecedented level.

The balance of these Reply Comments address certain specific averments and legal arguments advanced by the BOCs that obfuscate the issues and seek to undermine the legitimate exercise of the Commission's authority.

## II. The BOC's Argument that the FPTA Petition Is Barred on Procedural Grounds Is Without Merit

The BOCs argue that the *FPSC Payphone Order* (in which the state commission declined to make a finding that BellSouth's payphone line charges after April 15, 1997 did not comply with the NST or to order refunds of the EUCL portion of payphone line charges actually paid) and the Order of the Florida Supreme Court (in which the appeal of the *FPSC Payphone Order* was dismissed as untimely filed) represent "final judgments not subject to collateral attack" on

the grounds of res judicata, collateral estoppel, administrative finality, or on some other procedural basis. *BOC Comments* at 7. For several reasons, the BOC's argument that the FPTA Petition is barred on procedural grounds is without merit.

### A. Res Judicata Does Not Apply to Proceedings in Which the Commission Is Expressly Authorized to Regulate and Preempt the Administration of Federal Law by a State Regulatory Authority

The doctrine of res judicata is an affirmative defense to a lawsuit, the applicability of which is a question of law. *See* Rule 8(c) *Fed.R.Civ.Proc.*; *Gonzalez v. Banco Central Corp.*, 27 F.3d 751, 755 (1st Cir., 1994); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1287 (9th Cir., 1992). In contrast to more typical contexts, the application of the res judicata defense raised by the BOCs in this proceeding must be viewed with a clear recognition of the fact that a state tribunal (the FPSC) was operating on delegated authority from a federal tribunal (the Commission) subject to a well-defined set of federal statutory and regulatory standards and requirements governing the exercise of that authority and under a statutorily mandated preemption provision.

Specifically, section 276(c) states:

> (c) State preemption. To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

47 U.S.C. §276(c). Permitting claim preclusion to bar adjudication by the Commission in circumstances in which a state regulatory authority has established a requirement that is clearly inconsistent with the Commission's regulations would render this provision of the Act a nullity. Accordingly, the BOC's claimed preclusion argument, if permitted to prevail, would deny the

Commission its legitimate statutory role with respect to the regulation of payphone line charges.[11] The BOCs' formulaic application of procedural doctrines of claim and issue preclusion are fundamentally inconsistent with the type of shared state-federal regulatory jurisdiction established by the Commission under the *1996 Act* in general and by Section 276, 47 U.S.C. § 276, for payphone regulation in particular.

Moreover, the basis of such a procedural bar is to prevent prejudice to parties who depend on the finality of the orders of state courts or administrative agencies. Under the shared state-federal jurisdictional regime established by the *1996 Act*, however, such reliance is unjustified before the precise contours of the states' duties and responsibilities have fully been established. This applies *a fortiori* to proceedings such as the present case in which the scope of federal regulatory jurisdiction has been repeatedly challenged and, through a series of administrative and judicial orders, gradually clarified. The inflexible application of claim or issue preclusion,

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[11]The state-federal allocation of jurisdiction over payphone regulation under the *1996 Act* was part of a broader shift in the regulatory regime in which traditional state-commission administration of intrastate services was thereafter guided by federal-agency regulations. Thus, in its rejoinder to Justice Breyer's concurrence to the effect that the Commission's jurisdictional authority should be constrained by a "'presumption against the pre-emption of state police power regulations,'" quoting from *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992), the majority in *AT&T Corp. v. Iowa Utilities Board*, 523 U.S. 366 (1999), stated:

> ...the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.

*Id.* at 378, n. 6 (emphasis in original). In the present case, Congress charged the Commission with the responsibility of issuing regulations governing the pricing of payphone access line charges and granted the Commission the authority to preempt any state requirement to the extent it was inconsistent with any such Commission regulation. For the Commission's hands to be tied on the grounds that a decision of a state commission is final or unappealable under state law—no matter how erroneous, inconsistent, or contrary to the Commission's regulations, as the BOCs now claim—is also "surpassing strange."

therefore, is inconsistent with any meaningful role for the Commission in circumstances in which an issue is in the first instance determined by a state commission and would permit virtually unlimited scope for gaming the system, as the BOCs have done in this proceeding.

### B. The Defensive Use of Res Judicata Based on an Order of the Florida Public Service Commission Is Governed by Florida Law Which Does Not Bar the Relief Sought by FPTA

Even if the application of res judicata to the present petition could conceivably be deemed appropriate, the *BOC Comments* are not only unpersuasive on the res judicata effect of the prior decisions of the FPSC but they are also misleading. When the defense is raised in federal court based on a prior federal court judgment in a suit involving a federal question, federal law provides the decision rule. *See Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 324 (1971). However, when a res judicata defense is based on a prior decision of a state tribunal, state law and not federal law applies. *See Community Bank of Homestead v. Torcise*, 162 F.3d 1084, n. 5 (11th Cir., 1998) ("state court judgments are to be given the same preclusive effect in federal court that they would have in the state in which judgment was rendered" pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738 (1994)); *see also Durfee v. Duke*, 375 U.S. 106 (1963). Accordingly, the applicability *vel non* of res judicata to an order of the FPSC is governed by Florida and not federal law.[12] To the extent, moreover, that the Commission may be tempted to give quarter to the application of the principals of claim or issue preclusion under the present circumstances, FPTA respectfully submits that the *BOC Comments* mischaracterize the

[12] *See* Baicker-McKee, et al., *Federal Civil Rules Handbook* (2006) at §2.19 ("Because res judicata ... [is] not constitutional in nature, the influence of the Supreme Court on these doctrines is somewhat limited. The Court can and does establish the standards for these two doctrines when they are used in federal courts, but the states are free to accept or reject federal views of these doctrines. Supreme Court cases may therefore be an important source of influence on the application of res judicata ... in state court, but such decisions are not necessarily the final word").

letter and application of Florida law.

A random selection of quotations from judicial opinions in Florida case law appear to have been strung together in the *BOC Comments* without regard to the context in which those cases were decided. *Id.* at 7-8. Of the four Florida appellate court decisions cited by the BOCs, *all of them* involve a re-application by the same party in the same forum for the same relief and *none of them* were decided under the context of the type of shared state-federal regulatory scheme applicable to the regulation of intrastate payphone line charges.

The first quotation is from *State v. McBride*, 848 So.2d. 287 (Fla. 2003), a criminal case interpreting a Florida rule of criminal procedure in which the Florida Supreme Court *rejected* the state's argument that res judicata bars a defendant from raising successive motions attacking his sentence under a particular Rule of Criminal Procedure. In the second case, *Topps v. State*, 865 So.2d 1253 (Fla. 2004), the Court *again rejected* a res judicata bar to multiple writs of mandamus, stating "we do not intend to foreclose a litigant from possible relief in another court if a matter has not been determined on the merits and if it is more appropriate for that later court to determine the merits of the issue." *Id.* at 1257. Indeed, the Florida Supreme Court in *Topps* announced a rule that substantially contributes to Florida's well-known reluctance to impose procedural bars based on res judicata, stating that

> ... henceforth unelaborated orders denying relief in connection with all extraordinary writ petitions issued by Florida courts shall *not* be deemed to be decisions on the merits which would later bar the litigant from presenting the issue under the doctrines of res judicata...

*Id.* at 1258 (emphasis in original). It is difficult to see the persuasive effect—or even the relevance—that these two criminal law decisions bear on the BOCs exhortations to deny the

relief presently sought by FPTA.

The two other Florida cases cited by the BOCs are equally unavailing from the BOCs' perspective. In *Florida Power Corp. v. Garcia*, 780 So.2d 34 (Fla. 2001), a regulated power company filed a petition in 1994 before the FPSC for a declaratory order bearing on a negotiated cogeneration contract with a counterparty. The FPSC dismissed the petition on the grounds that it "had no jurisdiction to adjudicate contract disputes involving negotiated cogeneration contracts." *Id.* at n. 3, *citing In re Petition of Florida Power Corp.*, 98 F.P.S.C. at 12:66. Subsequently, in 1998, the same regulated power company filed a second petition for a declaratory order related to the same negotiated contracts. The FPSC again dismissed, stating that the "controversy has already been determined in our dismissal of FPC's prior petitions in Order 0210 and may not be re-adjudicated now." *Id.* at 41. The Florida Supreme Court, in an opinion quoted in the *BOC Comments* (with no indication that the emphasis in the quoted passage had been omitted), issued an extremely limited decision that

> ... under the circumstances of this case, the PSC's prior, unappealed ruling regarding its jurisdiction to entertain the controversy addressed in FPC's petitions—even if erroneous [fn]—operates as a bar to a subsequent determination *of that jurisdiction* over the same claim.
>
> [fn] The narrow issue addressed here is the preclusive effect of the PSC's prior determination in this case as applied to FPC's 1998 petitions for declaratory relief. We do not address the substantive issue of whether, absent the unique circumstances presented here, the Commission would have jurisdiction to entertain such a petition.

*Id*. at 43 (emphasis in original, citation omitted). It is unsurprising that even Florida's lax res judicata standard bars the *same party* from bringing the *same petition* seeking the *same declaratory relief* in connection with the *same contract* against the *same counterparty* in the

*same forum*. The case does *not* stand as authority for the proposition, as claimed by the BOCs, that an unappealed order of the FPSC always and everywhere bars later consideration of issues that might have—or even were—considered by the Florida commission.

Finally, the BOCs misleadingly quote *Florida Power Corp. v. State, Siting Board*, 513 So.2d 1341 (Fla.1st D.C.A., 1987) that "'[o]nce the thirty-day time period has expired, as it has here, such determination is res judicata and binding on all further proceedings'." *BOC Comments* at 8. The "determination" at issue in that case was the PSC's determination of the state's need for a new power transmission line. Under Florida law, the FPSC must first make a determination of need for a new transmission line, after which the application is then considered by the state's Department of Environmental Regulation (DER), and, finally, the application must be approved, modified or denied by the Governor and the state Cabinet sitting as the state "Siting Board."

The Siting Board in that case deferred on the grounds that the DER had not promulgated implementing rules governing its certification procedures and because the hearing before the FPSC had not included testimony to permit specific findings on the relative *degree* of need. On appeal, the First District reversed the Siting Board's order, primarily on the grounds that the DER was under no prohibition from developing incipient non-rule policy in adjudicatory certification proceedings and, secondarily, on the grounds that the Siting Board had erroneously ruled that "the question of PSC's determination of need ... may be revisited." The Florida Supreme Court, again, unsurprisingly, stated that Florida law "does not permit a *redetermination* of the *factual finding* of need made by the PSC ...." *Id.* at 1344 (emphasis in original). Here too, res judicata in the form of administrative finality was sensibly applied to prevent the same parties from having the same issues related to the same matter reheard before the same forum, *i.e.*, a context that

bears no resemblance to the instant proceeding.

While no Florida case on all fours was located that applies res judicata to the type of shared state-federal regulatory oversight created by the *1996 Act*, somewhat analogous circumstances were present in *Albrecht v. State*, 444 So.2d 8 (Fla. 1984). In that case landowners sought permission from the state DER to fill and bulkhead land that had eroded and become submerged. The DER denied the permit and landowners petitioned the First District Court of Appeal to set aside the denial on the grounds that the DER statute was unconstitutional. After that petition and the landowners' petition for a writ of certiorari to the state Supreme Court were denied, the landowners filed an inverse condemnation suit against the state claiming that the land had been taken without just compensation. The court dismissed the suit on the basis of res judicata, and the Third District Court of Appeal affirmed.

The Florida Supreme Court reversed and remanded the case for trial, finding that it was erroneous to presume "that because the statute allows such an issue to be brought before the district court on review of agency action, that it is mandating that it be brought only there. ... It is too broad a leap to take the words of a statute which provide for remand *if* the action is found to be in violation of the constitution and interpret them to mean that any constitutional issue *must* be raised there or be forever barred." *Id.* at 11 (emphasis in original). Nor does it matter under Florida law whether the petitioner exhausts administrative appeals as to the propriety of the action before filing suit for inverse condemnation. *Id.* at 10, *overruling Coulter v. Davin*, 373 So.2d 423 (Fla. 2d D.C.A. 1979) (in which the petitioner, as in the instant case, *did not* file a petition for review of the denial by a regulatory agency).

In the *BOC Comments*, as in the overturned decisions in *Albrecht* and *Coulter*, the res

judicata doctrine is misapplied based on the erroneous presumption that because FPTA *could have* appealed to the state Supreme Court, doing so was its sole or exclusive avenue for obtaining the requested relief.

### C. Florida Law Affords State Administrative Agencies More Latitude than Courts to Amend or Correct Final Administrative Orders

In a similar vein, by averring counterfactually that "[T]he Florida commission did exactly what the Commission asked of it," the BOCs seek to recast the relief requested in this proceeding as an attempt by FPTA to re-determine appropriately adjudicated factual findings that support a lawful access line rate tariff rather than what it is, *i.e.*, a request to hold the BOCs to their express undertakings to refund excessive rates that as a clear matter of law exceeded NST-compliant rates and, to the extent necessary, overrule any erroneous findings in the *FPSC Payphone Order*.

The distinction provides yet another reason to reject the argument that the relief sought in the FPTA Petition is barred on account of the finality of the *FPSC Payphone Order* and the FPSC's failure to issue any retrospective relief. Specifically, the law of claim preclusion in Florida is substantially more forgiving where administrative agencies "are charged with the statutory duty of regulating and supervising public utilities with respect to their rates." *Reedy Creek Utilities Co. v. Florida PSC*, 418 So.2d 249 (Fla., 1982). In that case, the FPSC made a calculation error in setting certain electric utility rates due to a change in the tax laws and later sought to correct the error and order refunds. The utility argued that the FPSC lacked the authority to order a refund after the original order setting the rate became final because it would constitute "retroactive ratemaking." The Florida Supreme Court ruled otherwise, holding that the

state commission "had the inherent power and the statutory duty to amend its order to protect the customer."

Similarly, in *Sunshine Utilities v. Florida PSC*, 577 So.2d 663 (Fla. 1st D.C.A., 1991), the FPSC in 1988 prospectively revised water company rates set four years earlier in a 1984 order in which a faulty assumption was made in calculating the rate base, and ordered refunds for overcharges collected by the utility over the intervening four-year period. The Florida appellate court affirmed, relying in part on *Reedy Creek*, stating

> The PSC ... has the authority to determine whether there are mistakes of this character in its prior orders and has a duty to correct such errors. ... [the cases cited] recognize an exception to the doctrine of administrative finality where there is a demonstrated public interest. Unlike the issues raised in those cases (authority to approve territorial agreements and the dormancy of transportation certificates), *the issue of prospective rate-making is never truly capable of finality*.

577 So.2d, at 665-66 (citations omitted, emphasis added).

In the present circumstances, there are clearly "demonstrated public interest" considerations to warrant a revisitation and correction. As pointed out by numerous of the initial comments, payphones continue to play an important role throughout the nation in the form of serving the economically disadvantaged in emergency conditions—which is why Congress mandated the continued widespread deployment of payphones in the *1996 Act*. Moreover, there is a strong public interest in assuring that carriers live up to their commitments, that the Commission's implementing regulations are followed, and that the preemption provision of section 276(c) is not undermined. Given these considerations, the FPTA Petition does not present a matter that would or should be barred under any principle of Florida law and neither res judicata nor any other Florida judicial doctrine constitutes a valid basis for such a bar or

preclusion.

## III. The Commission's Exercise of Its Discretion to Issue a Declaratory Ruling in Response to the FPTA Petition is Procedurally Proper

The BOCs claim that the issues raised by the FPTA petition require "case-by-case" consideration that is "inappropriate for a declaratory ruling proceeding of this kind." *BOC Comments*, at 10. The FPTA's Petition, however, is entirely appropriate pursuant to Section 1.2 of the Commission's rules, under which the Commission "may ... on motion ... issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. In the present proceeding, no colorable argument can be advanced either that a controversy does not exist or that the rights of PSP's across the nation, including those in Florida, are not riddled with uncertainty.

The BOCs legal authority for its claim that the FPTA Petition is "not an appropriate subject for a declaratory ruling" (*BOC Comments*, title of section II) is *In the Matter of Omnipoint Communications, Inc. New York MTA Frequency Block A*, Memorandum Opinion and Order, 11 FCC Rcd. 10785, 10788, par. 9 (1996) (*Omnipoint Order*). However, the *Omnipoint Order* cannot fairly or in good faith be interpreted to stand for the proposition that the FPTA Petition is improper. Apart from its procedural and substantive dissimilarity with the current case, the *Omnipoint Order* was plainly based on the fact that the relief requested was "not ripe for [FCC] consideration" at that time and because "no unusual and compelling

circumstances [were] present."[13] It is obvious that such circumstances depart from the proceeding now before the Commission. The present matter is certainly ripe for decision, the type of federal-state jurisdiction applicable to payphone line rates and the circumstances behind the *Bureau Waiver* and *Refund Orders* are certainly unusual, and the equities that implicate the BOCs' commitment letters, their collection of dial-around revenue for years, and the public interest in ensuring the widespread availability of payphone services are all circumstances that render the present proceeding clearly compelling.

Thus, not only does the cited authority offer no support for the proposition that the present FPTA Petition is "inappropriate for a declaratory proceeding of this kind," but the *Omnipoint Order* appears to be devoid of *any* rational relation to the present proceeding, other than the distant similarity of having arisen in the context of a petition for a declaratory ruling.

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[13]The complete paragraph 9 of the *Omnipoint Order* to which the BOCs refer reads:

> 9. In addition, although ripeness concerns addressed by federal courts in the context of Article III do not apply to agency declaratory rulings, the concepts of ripeness can also provide a useful analogy in determining whether the Commission should exercise its discretion to issue declaratory rulings. We conclude that this is not an appropriate case to issue such a ruling because the question of the extent to which technology must be deployed in order to satisfy the "substantial use" condition is not ripe for our consideration at this time and no unusual and compelling circumstances are present. A finding of "substantial use" entails a judgment of the degree and/or nature of deployment and use, which can be affected by the nature and extent of other technologies with which the pioneer's preference technology is entwined, the effect of market forces, the effect of ensuring technological advancements, and other factors. Such judgments are best made on a case-by-case basis. No precise formula for "substantial use" can productively be set for at this time, and any effort to do so would only serve to delay unnecessarily the deployment and use of pioneer's preference technology. In the instant case, Omnipoint's broadband PCS system in the New York MTA is still under construction, and Omnipoint has until the five-year build-out date specified in its license authorization, December 13, 1999, to meet its build-out requirements. Therefore, the issue of substantial use is not yet ripe for Commission review.

*Id*., at par. 9 (footnotes omitted).

## IV. Because the FPSC's Determination of the Lawfulness of BellSouth's Tariffs Prior to November 10, 2003 Departed from the Essential Requirements of Law, the Filed Rate Doctrine Does Not Apply

The BOCs also suggest that the relief sought in the FPTA Petition is barred by the filed rate doctrine. However (issues of federal-agency supremacy aside), the filed rate doctrine only applies to lawful tariffs filed in furtherance of an established regulatory process. It does not apply to bar attacks on rates that do not comport with underlying regulatory requirements and thereby are void *ab initio*. This limitation on the filed rate doctrine is clear from the authority cited by the BOCs themselves.

In *Florida Municipal Power Agency v. Florida Power & Light, Co.*, 64 F.3d 614 (11th Cir., 1995) (cited on page 13 of the *BOC Comments*), summary judgment was entered by the district court against the plaintiff on grounds that claims for damages arising from rates in effect under a lawfully filed tariff were barred. In vacating and remanding the case, however, a panel of the Eleventh Circuit held that the filed rate doctrine did not apply, noting that Supreme Court cases after *Keogh v. Chicago & Northwestern Rwy.*, 260 U.S. 156 (1922)—in which the doctrine was initially crafted by Justice Brandeis—"emphasized the limited scope of the filed rate doctrine to preclude damage claims *only where there are validly filed rates*." 64 F.3d at 616 (emphasis added). The panel further noted that "[i]n its most recent decision discussing the filed rate doctrine, the Court held that a carrier could not rely on that doctrine when, having filed a tariff lacking an essential element, 'in effect it had no rates on file ....'" *Id.* at 616 *quoting Security Services v. Kmart Corp.*, 511 U.S. 431, 453 (1994).

Unlike the *Keogh* decision, in which the doctrine was established, or *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), in which it was reaffirmed, the

present case does not involve rates or tariffs which, despite being lawfully filed with a regulatory agency and approved according to the applicable administrative laws, rules and procedures, nonetheless involved conduct by the regulated entities that may have violated the antitrust laws. The present case involves a very different context in which no lawfully filed tariffs or approved rates were in effect, because the tariffs relied upon did not satisfy the applicable federal laws or the Commission's regulations. To apply the file rate doctrine to shield regulated entities from liability for excessive charges under rates that although "on file" depart from essential regulatory requirements established by this Commission makes little sense, and furthers none of the anti-discrimination, regulatory, or choice-of-law policies underlying *Keogh* and *Square D*.

The fundamental logic supporting those decisions (and the intent behind the filed rate doctrine in general) is entirely absent in the present case. That logic depends on the proposition that rates which are *properly filed and properly approved by a regulatory commission according to the requirements of the applicable regulatory law and administrative regulations* are thereby *made lawful* by the fact of regulatory approval even though, in the absence of regulatory approval, those same rates, if charged in an unregulated market, might implicate the antitrust laws or constitute some other violation of law. In the present case the fact that payphone access line overcharges exacting double recovery of at least the amount of the EUCL happen to corresponded to a tariff on file with the FPSC cannot—and, indeed, must not, if there is to be integrity in the Commission's regulatory process—be considered lawful solely because they were on file at the FPSC. Simply put, state tariffs containing charges that violate the methodology for rate setting mandated by this Commission, and erroneously "approved" by the FPSC, are not per se "valid tariffs" and should not enjoy immunity under the filed rate doctrine.

Finally, even if the filed rate doctrine could justifiably be applied to the clearly erroneous rates at issue in this proceeding, the BOCs have waived any reliance on the doctrine. And, contrary to BellSouth's denial that it "somehow waived its defenses to FPTA's refund claim," *BOC Comments* at 15, FPTA submits that BellSouth and the other BOCs did not "somehow" waive the filed rate defense to refunds. They did so expressly and in writing.[14]

For all of the forgoing reasons, the Commission should determine that the relief sought by FPTA is not barred by the filed rate doctrine.

## V. BellSouth Clearly Relied on the Bureau Refund Order

Contrary to the BOC's claim that BellSouth "did not seek to rely on the waiver" granted in the *Bureau Refund Order* in response to the *BOC Waiver Request*, this averment is belied by the uncontraverted facts. BellSouth cannot deny that after the issuance of that Order they began collecting dial-around compensation and continued to charge PSPs excessive rates that did not comply with the NST. By now claiming that "BellSouth's filing of new tariffed rates [in 2003] is immaterial to the question whether FPTA may demand a refund of charges paid under a valid tariff," *BOC Comments* at 15, BellSouth is arguing that it is entitled to the benefits of the waiver agreement—under which it would continue to charge existing rates until NST-compliant rates were filed while collecting dial-around compensation—but not obligated to fulfill the duty established by the agreement, *i.e.*, to refund the amounts by which the then existing line charges

[14] *See Implementation of the Pay Telephone and Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Petition of the Independent Payphone Association of New York, Inc. for an Order of Pre-emption and Declaratory Ruling (filed Dec. 29, 2006), Exhibit A, Letter from Michael Kellogg to Mary Beth Richards (Apr. 10, 1997) (*BOC Waiver Request*) ("the filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However, [the BOC Coalition] can and do voluntarily undertake to provide one, consistent with state regulatory requirement, in this unique circumstance").

exceeded later filed NST-compliant tariffs.

Any characterization of the tariffs on file before the FPSC finally ordered NST-compliant rates as "valid" in this context strains credibility. Upon BellSouth's filing of new tariffs pursuant to the *FPSC Payphone Order*, PSP access line charges declined by approximately 43% (about $39 down to about $22 on average) from their level between April 15, 1997 and November 9, 2003. It is difficult to understand how two rates, one of which is almost twice as much as the other, can both comply with the same rate-setting methodology, unless a dramatic change in the underlying cost of the service has occurred. Having made no such claim nor presenting any evidence of any such upheaval in the level of costs, the only conceivable explanation for the difference in the rates is a difference in the methodology used to compute them. Accordingly, far from being "immaterial" to the refund presently claimed by FPTA, the revised tariffs filed by BellSouth in 2003 are irrefutably probative of FPTA's entitlement to the claimed refund.

Finally, the suggestion that BellSouth did not rely on the waiver because its NST-compliant tariffs were not filed within the 45-day period contemplated in the *Bureau Refund Order* would not only reward BellSouth for its recalcitrance, but also represent an interpretation of the relevant Commission Orders that can only be described as grossly strained. It is beyond the pale that the BOCs would attempt to argue to the Commission that the nature of the waiver was such that refunds would be due to PSPs if revised tariffs were filed within 45 days of April 15, 1997, but not if such rates were filed on the 46$^{th}$ day.

## VI. A Refund Remedy Is Preferable to Disgorgement of Dial-Around Compensation

As clearly reflected in the Bureau Refund Order and elsewhere, refunds of excessive line charges were the bargain the BOCs struck in exchange for the right to begin collecting dial-

around compensation in advance of filing NST-compliant rates. Disgorgement of the dial-around compensation BellSouth collected pursuant to that bargain, therefore, represents an alternative remedy to the BOCs refusal to comply with their duties under the waiver agreement.

BellSouth argues that FPTA "lacks standing" to suggest this alternative remedy. *BOC Comments* at 16. However, if the BOCs are permitted to escape their refund commitments, it is the material injury to FPTA and the other PSPs in the form of un-refunded excessive line charges that will have directly enabled the enrichment of the BOCs. Accordingly, FPTA and the other PSPs are directly affected by and interested in the enforcement of the waiver agreement through the payment of refunds owed or in obtaining a novation of that agreement and disgorgement of the dial-around compensation that the BOCs collected based thereon. Moreover, whether or not FPTA has standing to request disgorgement, the Commission could certainly order such relief on its own motion to enforce prior FCC rulings and to hold the BOCs to their bargain as a matter of public policy. With that said, FPTA acknowledges the magnitude and difficulty of such an exercise, and the fact that, in contrast to ordering refunds, such disgorgement would do little to further the statutory mandate and public policy imperatives for promoting widespread deployment of pay telephones across the nation.

## IV. Conclusion

For all of the reasons set forth above FPTA respectfully requests that the arguments and averment presented in the *BOC Comments* be rejected and that the relief requested in the FPTA Petition be granted.

Respectfully submitted,

Florida Public Telecommunications Association, Inc.

By:_____/s/_____

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